

does not include the medical records and reports marked Claimant's Exhibit No. 1 and Respondent's Exhibit Nos. 1, 2, 4, 5, and 7, which were introduced for purposes of the June 7, 1993, Preliminary Hearing only.

ISSUES

The Assistant Director granted claimant an award of permanent partial disability based upon a functional impairment of 51 percent and assessed 100 percent of the liability for the award against the respondent. The nature and extent of disability and the liability of the Workers Compensation Fund are the two issues raised by respondent for review. Claimant raises an issue concerning whether it was appropriate for the Assistant Director to consider certain exhibits introduced at the preliminary hearing. Claimant also raises an issue concerning the computation of the award. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the Assistant Director should be modified to correct the award calculation but should otherwise be affirmed.

At the July 19, 1996, Regular Hearing the Administrative Law Judge announced that the transcript of the June 7, 1993, Preliminary Hearing in this matter would be considered a part of the record except for the medical exhibits, "unless those doctors testify or the parties agree that those reports can be made a part of the record." (Regular Hearing at 8.). No party objected. Claimant now objects to the references in respondent's brief to the affidavit of Carolyn Mounce, an employee of respondent, which was introduced into evidence at the preliminary hearing marked "Respondent's Exhibit 3." Claimant argues this affidavit is not a part of the record, citing K.A.R. 51-3-5a. That regulation, as it is generally applied, excludes medical hearsay as indicated by the Administrative Law Judge's announcement excluding only the medical exhibits from the record taken at the preliminary hearing. See *also* Cormack v. U.S.D. No. 495, Docket No. 190,238 (July 1996); Grist v. Moran Implement Company, Docket No. 114,502 (September 1994). The affidavit is not medical hearsay. Claimant argues the regulation limits the use of affidavits to preliminary hearings only. The Appeals Board needs not reach that issue given the parties acquiescence to the Judge's ruling at the Regular Hearing. The affidavit of Carolyn Mounce is a part of the record.

With regard to the computation of the award, the parties stipulated to claimant's average gross weekly wage as \$653.84. K.S.A. 1992 Supp. 44-510e(a) provides in pertinent part as follows:

"The amount of weekly compensation for permanent partial general disability shall be determined: (1) By multiplying the average gross weekly wage of the

worker prior to such injury by the percentage of permanent partial general disability as determined under this subsection; and (2) by then multiplying the result so obtained by 66 $\frac{2}{3}$ %."

When \$653.84 is multiplied by 51 percent and the result is multiplied by 66 $\frac{2}{3}$ percent, the weekly compensation rate for permanent partial general disability is found to be \$222.32. The award computation is corrected to use the \$222.32 amount as opposed to the \$299.00 rate used by the Assistant Director.

The findings of fact and conclusions of law as enumerated in the Award by the Assistant Director are otherwise found to be accurate and are hereby adopted by the Appeals Board. The Appeals Board agrees that claimant has sustained his burden of proof that his injury resulted in a 51 percent general disability. The Appeals Board further agrees with the analysis of the evidence by the Assistant Director regarding the issue of Fund liability; that is, that respondent did not establish prior knowledge of a handicap. Therefore, the Workers Compensation Fund is not liable under K.S.A. 44-567.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery, dated March 31, 1997, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Albert M. Ruttinger, and against the self-insured respondent, Johnson County, Kansas, for an accidental injury which occurred on November 19, 1992, and based upon an average weekly wage of \$653.84 for 415 weeks of permanent partial disability compensation at the rate of \$222.32 per week or \$92,262.80, for a 51% permanent partial disability, making a total award of \$92,262.80.

As of October 1, 1997, there is due and owing claimant 253.86 weeks of permanent partial disability compensation at the rate of \$222.32 per week or \$56,438.16 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$35,824.64 is to be paid for 161.29 weeks at the rate of \$222.32 per week, until fully paid or further order of the Director.

In all other respects the orders contained in said Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale E. Bennett, Overland Park, KS
Karen D. Pendland, Kansas City, MO
Nathan M. Sutton, Prairie Village, KS
Julie A. N. Sample, Administrative Law Judge
Brad E. Avery, Assistant Director
Philip S. Harness, Director